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# Alma Phyllis Hall v. Lynn Bateman Hall : Brief of Appellant

Utah Supreme Court

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Attorneys for Appellant; Horace C. Beck; H. A. Smith;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

ALMA PHYLLIS HALL,

*Plaintiff and Respondent,*

—vs—

LYNN BATEMAN HALL,

*Defendant and Appellant.*

FILED  
MAY 10 1958  
Supreme Court, Utah  
Civil No. 8772

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BRIEF OF APPELLANT

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*Attorneys for Appellant.*

HORACE C. BECK

H. A. SMITH

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BRIEF OF APPELLANT

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STATEMENT OF FACTS

Plaintiff and defendant were married July 6, 1949 and had three children Shauna Louise Hall, born Feb. 20, 1950; Lynn Kelly Hall, born March 1, 1951, and Raelene Hall, born about April 1, 1952 (R-1). On March 3, 1952 plaintiff filed in the District Court of Salt Lake County, Utah, a complaint for divorce and the decree of divorce was entered March 4, 1952, on entry of appearance and stipulation of property settlement and alimony and support money; \$30.00 for support of each

child and \$30.00 a month alimony for plaintiff. Plaintiff was awarded custody of children subject to reasonable rights of visitation reserved to the defendant. Decree provided that if plaintiff remarried the \$30.00 alimony should cease (R-6).

On June 30, 1954 the parties by written stipulation agreed that alimony to plaintiff should cease and that thereafter support money would be \$90.00 per month for support of children. Similar order entered July 9, 1954 (R 11-12).

On January 10, 1955, defendant filed an affidavit reciting that the plaintiff was living as one of the plural wives of one Johannes C. Roestenburg under conditions detrimental to the morals and general welfare of the children, and that plaintiff was about to depart from the State of Utah, and asking that plaintiff be restrained from taking the children from the State of Utah and to show cause why the decree should not be modified awarding custody to father (R-14). The order to show Cause issued thereon was delivered to a detective named Romano to serve but he was unable to serve it (R-55). Mr. Fadel, attorney for plaintiff advised Romano that plaintiff had left the state (R-127).

On October 17, 1956 (R-17) defendant filed a petition for modification of Decree reciting that plaintiff was living as a plural wife of Johannes C. Roestenburg under conditions detrimental to the welfare and morals of the children; that she had departed from Utah about

January, 1955, and had resided in Mexico as one of the plural wives of said Roestenburg. At the same time (R-15) defendant moved for an order for Publication of notice upon the plaintiff of the hearing on the motion to amend the decree, in which motion it was alleged that whenever the plaintiff learned of the attempts of the defendant to locate her she moved with the children to another locality, making it virtually impossible to serve process upon her. On October 17, 1956 (R-21) the District Court entered its order setting the time for hearing of defendant's motion to amend filed October 17, 1956, on December 10, 1956 and directing that notice of that hearing be served on plaintiff by publication. The notice was published (R-20). On December 10, 1956 defendant's motion to amend decree came on for hearing pursuant to the notice. The plaintiff was not present or represented, and on defendant's verified petition the decree was amended awarding custody of the children to the defendant (R-23).

In July, 1957 (R-106), Mr. Fadel, plaintiff's attorney wrote a letter to the mother of defendant advising that plaintiff was residing at 3016 Third, N. W. Albuquerque, N. M. and needed financial assistance. Immediately defendant's mother went to Albuquerque, showed plaintiff the court order awarding custody of the children to defendant and brought the children back to Salt Lake City, Utah, and then sent them to their father, the respondent at Olympia, Washington, where he resides and is employed.

On August 9, 1957, the plaintiff filed her petition (R-30) that the decree awarding the custody to the defendant be amended to award custody to her; that the defendant be required to pay the back support money in the sum of \$3240.00 and to require the immediate delivery of the children to her. With that petition she filed a motion (R-33) that the court set aside its order of December 13, 1956 awarding custody to the defendant on the ground that the findings were not supported by any evidence, and that defendant had no notice. An order to show cause was issued on plaintiff's petition and motion (R-34) returnable August 16, 1957. Defendant filed an answer and cross petition (R-37) incorporating by reference the previous affidavit and petition, and alleging that he had employed private, state and federal investigators in an attempt to locate plaintiff and the children and had expended in that behalf \$2,395.60.

The matter came on for hearing before Judge Martin M. Larson, on plaintiff's motion and petition to amend and defendant's Answer and Cross Petition on September 12, 1957. The District Court ruled that the order of October 17, 1956 awarding custody to the defendant was invalid because of lack of personal notice and because the court did not hear evidence in support of the petition on which the order was granted, whereupon the court proceeded to hear the matter on defendant's petition and motion to amend that was before the court on December 10, 1956 and on which the District Court had previously ordered that the defendant have custody of the children (R-43).

Alma Phyllis Hall, the plaintiff and respondent called as a witness by the defendant testified that on July 17, 1954, she had married Joe Roestenburg at Ely, Nevada (R-45), and that they were divorced in May, 1957 at Albuquerque, N.M.

Prior to the early summer of 1954 (R-74) plaintiff lived with her children at 1208 Driggs Avenue, Salt Lake City. They moved from Driggs Avenue to 920 Gold Place, in Salt Lake City (R-47), a duplex occupied by her and her children on one side and Shirley Maycock and her children on the other side. Prior to the marriage of plaintiff to Roestenburg he had been married to Lois Roestenburg and divorced (R-46). While living on Driggs Avenue Shirley Maycock had lived with plaintiff and Joe Roestenberg was a frequent visitor there. Sometimes Lois Roestenburg was there also (R-72).

The plaintiff left her Gold Place residence about a month prior to February, 1955 and went to Pocatello where she remained about a month (R-48), and from Pocatello she and her husband went to Monterey, Mexico (R-50). While in Monterey Shirley Maycock and Lois Roestenburg and their children all ate, slept and lived together (R-51). Lois Roestenburg was there about 3 months and Shirley Maycock a month or two (R-52).

In November, 1955, Roestenburg and plaintiff and their children moved to Albuquerque, N. M. Lois Roestenburg and her children also moved to Albuquerque at that time, but they lived in a separate house in Albu-



querque. Shirley Maycock was there also part of the time (R-56). After plaintiff was divorced from Roestenburg, he continued to visit plaintiff and the children at Albuquerque and on at least one night stayed over night (R-62 and 103).

From the time the plaintiff moved from Gold Place early in January, 1955 until July, 1957 when Mr. Fadel, plaintiff's attorney wrote to the mother of defendant advising where the plaintiff was, the defendant did not know where the plaintiff and the children were, although he had made diligent efforts to locate them. He had hired Mr. Romano, an investigator to locate them, and Mr. Fadel plaintiff's attorney refused to divulge their whereabouts except to state that they were not in the state of Utah (R-83 and R-127). Mrs. Kelly, defendant's mother had inquired of plaintiff's mother where plaintiff was. She was not given the information but was told to "Go sit on a tack." The plaintiff in his motion and petition duly verified stated that he had enlisted the aid of both federal and state agencies to locate his wife and children without success (R-15). The defendant testified (R-120) that he had spent \$500 for detectives and \$2,000 for other expenses in an effort to locate the children. It was stipulated that inquiry was made of Mr. Fadel, plaintiff's attorney as to whereabouts of plaintiff and the children, and Fadel declined to divulge that information but offered to forward any money to her, so that he knew her whereabouts (R-127).

The defendant did not pay any installments of support money after November or December, 1954, when the plaintiff disappeared. In October, 1954 Mr. Romano had a check to deliver to plaintiff but he could not locate her to give it to her, and the check was returned (R-99). Plaintiff testified that if payments had been paid to her mother that she would have forwarded them to plaintiff (R-59). The amount in arrears at the time of the hearing was \$2,970, for which amount the court gave plaintiff judgment (R-134).

Plaintiff testified that she did not try to find out where the defendant was to force him to make the payments "Because I was trying to enjoy living a peaceful life; to me, it was worth it, at the time." (R-60).

It was stipulated that Mrs. Ovaard, who was ill, would have testified that plaintiff told her that she believed in polygamy as an act of God and that the plaintiff would not deny God; that the plaintiff had practiced polygamy but was divorced, and is not now practicing polygamy (R-123).

#### POINTS ARGUED BY APPELLANT:

1. The Court erred in refusing to permit appellant to show the polygamous relationship between Joe Roestenburg, her husband and respondent, Lois Roestenburg, his divorced wife and Shirley Maycock, in the following respects:

Witness: Respondent. (R-68)

Q. Do you practice polygamy?

A. No.

Q. Do you know whether or not Mr. Roestenburg does?

Objected to as immaterial and objection sustained.

Witness: Romano.

Q. What did you observe? (R-86)

A. Well, I observed that her (respondent) and Shirley and this other woman — Lois — that lived on 4500 South, they associated very closely together. I observed Joe, then, take turns staying with one woman, moved in with another one, then moved in with another woman.

Q. You actually seen that?

A. Yes, sir: I seen them go to bed, sir.

Q. Be little more explicit: just state what you observed there.

A. Well, I observed they acted, when Joe was with Shirley—

Witness interrupted by objection to this testimony because it was remote and immaterial.

The Court sustained the objection and ruled this testimony was wholly immaterial; that Joe

Roestenburg was not on trial and not involved in the case.

And on page 89 of the record:

MR. KELLY: (Plaintiff's attorney) I take it, then, the court's ruling is to the effect that this witness cannot testify; it is immaterial so far as to any of the actions of Roestenburg with respect to the other woman involved — I mean, as mentioned in this case, other than just Phyllis; is that correct? That's the ruling of the court, as I understand it?

THE COURT: That's right.

2. The court erred in awarding judgment against the defendant in the sum of \$2970.00 as installments of support money in arrears.

#### ARGUMENT ON POINT 1.

The primary issue before the court was whether the plaintiff had neglected her children by the defendant by reason of the fact that she was living in polygamy as one of the plural wives of Johannes (Joe) C. Roestenburg, as alleged in defendant's petition for Modification of the Divorce Decree filed October 17, 1955 (R-17), and incorporated by reference as a part of his Answer and Cross Petition filed August 23, 1957 (R-37). In support of that allegation the record shows that Roestenburg had been married to Lois Roestenburg and divorced from her and that he had married plaintiff; that Roestenburg, defendant Lois and Shirley had been friends since high-

school; that Shirley lived with defendant on Driggs Avenue in Salt Lake City and moved with her to the duplex at Gold Place; that according to Romano's testimony Roestenburg visited, lived with, and slept with defendant, Shirley and Lois while defendant was living at Gold Place; that defendant and Roestenburg in February, 1955 moved to Mexico and that Shirley and Lois also moved to Mexico and lived with them with their children; that when defendant and Roestenburg moved to Albuquerque Lois and Shirley, also moved to Albuquerque; that although defendant and Roestenburg were purportedly divorced Roestenburg continued to live with defendant at Albuquerque, at least he was there and stayed all the night that the grandmother was there to get the children, and the defendant admitted that he had visited her after the divorce and on at least one occasion had stayed all night. The defendant testified that she went to Mexico and did not communicate with plaintiff because she "was trying to live a peaceful life." The record is entirely silent as to why the plaintiff could not live a peaceful life in the United States, except that she was living in polygamy.

The defendant admitted to Mrs. Ovaard that she believed in polygamy as an act of God and that she had been living in polygamy.

In view of the foregoing facts it was very material to defendant's case to prove what Roestenburg's relationship, conduct and actions with Shirley and Lois were

It was highly prejudicial to defendant's case for the court to rule that the defendant could not go into the conduct of Roestenburg with Shirley and Lois. A man cannot practice polygamy with only one wife, and to prove his and her polygamous status it was necessary to show his actions with the other two women involved.

It will doubtless be contended that inasmuch as defendant and Roestenburg were divorced prior to the hearing the fact that he had been practicing polygamy while married to defendant became immaterial. Our answer is that the defendant voluntarily placed the children involved in a polygamous home in Mexico, without any explanation for so doing, in February, 1955 and kept them in that environment in Albuquerque until they were taken from in August, 1957. Furthermore, Joe was divorced from Lois prior to his marriage to defendant in July, 1954, and yet he and Lois continued to live as man and wife. The only conclusion that can be drawn from the conduct of Joe and Lois continuing to live together after their divorce, and of the defendant and Joe continuing to live together as man and wife after their divorce, is that these people have no respect for statutory marriages or divorces. Their belief is that marriage and divorce are matters between themselves and their God, and that man-made laws are not binding on them. They get either married or divorced to suit their own convenience in an effort to evade prosecution for their prohibited conduct.

We rely upon, and respectfully refer the court to the case of *In Re State of Utah in the interest of Black*, 3 Utah 2nd. 315. 283 P. 2. 887, decided by this court May 16, 1955. That case deals with the problems of polygamy in relation to child custody, and on the basis of that case and the rules therein set forth, we respectfully submit that it was highly prejudicial for the court to rule that proof of the activities of Joe Roestenburg with Shirley and Lois were immaterial.

#### ARGUMENT ON POINT 2.

The defendant was paying the decreed amount for the support of his children until the fall of 1954. At that time the plaintiff was married to Joe Roestenburg, and according to Romano was living in polygamy. The defendant then discontinued his payments and the plaintiff secretly left her dwelling at Gold Place and went to Pocatello, thence Monterey, Mexico, all unknown to defendant and without his permission and in violation of his right of visitation in the divorce decree. Her only reason for going is so that she could live in peace. She and her mother and her attorney refused to divulge her whereabouts and she made no effort to collect support money. She said it was worth not receiving the support money to be able to live in peace. In the meantime the plaintiff hired detectives and sought the aid of federal and state officers in an effort to locate the defendant and his children. His cross petition under oath recites that he had expended \$2,395.60, and his testimony was

that he had expended \$2,500.00 in an effort to locate the defendant and his children. Under the above circumstances the defendant has elected not to collect the support money, has waived her right to it, and is estopped to now receive it, and it is unjust, unfair and improper to now award it to her, and in doing so the court acted arbitrarily and contrary to the evidence in this case. Our contention in this respect is supported by the decision of this court dated July 31, 1956, in the case of *Larsen v. Larsen*, 300 Pac. 2nd 596, 5 Utah 2nd 224.

The appellant respectfully requests that this court reverse the judgment of the trial court in respect to back alimony and that it rule that the trial court erred in refusing to permit appellant to show the polygamous conduct between Joe Roestenburg, Lois and Shirley, and that this case be sent back to the District Court for a rehearing in that respect.

Respectfully submitted,

HORACE C. BECK,

H. A. SMITH,

*Attorneys for Appellant.*